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IN THE

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SAM COURTNEY,

Defendant-Appellant.

PETITION FOR REHEARING

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PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The defendant Sam Courtney respectfully petitions for a rehearing of this appeal previously heard on June 6, 1958, and decided August 20, 1958. Upon application timely made, the defendant's time to file this petition has been extended to September 25, 1958.

Upon the original appeal only three errors were urged in this court. The first dealt with the erroneous admission of evidence. The second concerned the trial court's failure to strike surplus matter from the indictment. The third related to allegedly improper statements made by the prosecutor in his opening.

This court did, indeed, find error in the admission of certain trial evidence but held that it did not require reversal in a case in which the appellant did not deny his guilt upon the appeal (Opinion of this Court filed August 20, 1958, pp. 2231, 2233).

We trust that nothing in this petition will be construed as casting any reflection whatever upon petitioner's able and distinguished former counsel who may have been confident that the errors previously asserted would require reversal of the conviction.

Nevertheless, upon reading the record of the proceedings we are convinced that the guilt of the defendant was not proven; that there are four major errors which require the reversal of the conviction and that these errors were not considered by the court upon the original appeal.

Upon reargument we believe it will be shown to this court:

1. That the prosecution undertook to disprove payments made to certain classifications of persons but failed to identify or call as witnesses all members of those classifications and wholly failed to offer proof of the materiality of the alleged false statements.

2. That the "two witness rule" of perjury prosecutions was incorrectly applied by the trial court which wholly failed to instruct the jury regarding the requirement of direct proof of falsity, failed to instruct the jury with respect to corroborating evidence and left the jury free to utilize evidence relating to one count of the indictment as corroborating evidence to other counts.

3. That the trial court wholly omitted to submit to the jury one of the essential elements of the crime charged, and ruled as a matter of law that matter essential to the Government's case had been proven.

4. That over the objection of defense counsel, the trial Judge improperly failed to confine the issue

submitted to the jury to the charge framed in the indictment.

Introduction

Mindful of the rule of this Court which requires that petitions for rehearing shall be of limited length, we will not attempt extensive argument of the facts or the law herein but instead shall simply indicate the serious nature of the questions involved and that they fully merit a review by the Court.

It will be remembered that the defendant was charged with ten counts of perjury allegedly committed during his testimony before a grand jury.

The defendant was sentenced to three years imprisonment.

In point of fact only two of defendant's answers before the grand jury are in issue. However, in each answer the witness referred to five places that he had visited during the previous week. Each answer was, therefore, divided by the Government into five separate portions and each was made the subject of a separate count in the indictment.*

The defendant had testified in the grand jury that he was in the trucking business in the garment area and that he and his associates distributed substantial amounts of money or gratuities to freight elevator operators, at

* The defendant testified in the grand jury that he had visited 462 7th Avenue; 463 7th Avenue; 1375 Broadway; 1400 Broadway and 501 7th Avenue in the week ending June 22, 1956. This answer formed the basis for counts one through five of the indictment, each of which referred to one of those buildings. The same technique was utilized with respect to five "packing houses" which are referred to in counts six through ten.

packing houses and to policemen in order to facilitate the movement of freight and packages entrusted to them for shipment (App. 4-5).* These gratuities did not exceed $2 (App. 5).

The indictment concerned itself only with gratuities given during the week ending June 22, 1956. According to the indictment the alleged perjury related to payments totalling $64 during that week. (This figure assumes that every payment about which the defendant is claimed to have testified was a maximum $2 payment.)

The Government claimed that the defendant had not paid gratuities at the places which he had mentioned in his grand jury testimony. To disprove the truth of the testimony the prosecutor called whatever witnesses were available to it in the categories described, *i.e.*, elevator men or packing house employees, who testified that they had not received gratuities from the defendant during the week in question.

In the case of some of the buildings and packing houses the Government was able to secure the testimony of all of the employees . . . . But every employee of the establishments referred to in counts 1, 2, 6, 7, 8, 9, or 10 of the indictment was not called, nor was the possibility that they had received gratuities during the week in question eliminated.

The state of the Government's proof at its conclusion was that they had produced ten groups of witnesses. The testimony of each group related to a different count of the indictment, but the testimony of each group was substantially the same as the testimony of every other group. It was to the general effect that they received gratuities from trucking companies, that this was a regular practice, but

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* References prefaced by "App. —" are to pages in Appellant's Appendix. References prefaced by "R. —" are to pages in the Minutes of Trial.

that they had not received gratuities from the defendant during the week of June 15, 1956.

In addition to these groups of witnesses whose testimony bore upon specific and separate counts of the indictment, the Government also called four other witnesses whose testimony was of little significance, was general in nature and did not tend to demonstrate the incorrectness of any particular statement charged as false in the indictment (Perman R. 491; Koghet 296; Flynn 705; Crane 763). Their testimony related to the accounting methods of the defendant's company, the operation of its petty cash fund and exculpatory statements made by the defendant at the time of his arrest. The remaining Government witness was the grand jury foreman who testimony will be discussed in detail below (Geoghegan R. 47).

POINT I

The Prosecution Failed To Prove The Guilt Of The Defendant Beyond A Reasonable Doubt

A. The proof adduced by the Government was legally insufficient to pose a jury question.

The Government's case was legally inadequate in several respects and should not have been submitted to the jury.

As has been previously noted, the claim of the prosecution was that the defendant had lied when he testified that he had given gratuities to the elevator men at certain garment area buildings and at "packing houses" with which his company did business.

In attempting to prove the first five counts of the indictment the Government called as witnesses a group of elevator operators from each of five buildings to testify that they had not received gratuities from the defendant during the week of June 15th.

It would appear logical that where the Government elects to prove its case in this manner it should be required to show that none of the operators received money from the defendant during that week. With respect to two of the first five counts of the indictment the prosecution did not meet this requirement.

Two vital links in the Government's chain of proof were totally and admittedly missing, for one of the operators, Coyle (Count 1), had died prior to the trial and the other, Sterrite (Count 2), was unavailable (App. 395).

It might, indeed, be a strange coincidence that the missing witnesses from the buildings at 462 and 463 7th Avenue should be the ones to whom the defendant had paid gratuities. But there was nothing in the proof to rule out that very coincidence and the presumption of innocence as to those two counts of the indictment should not be fettered by a chain no stronger than a totally missing link.

In support of counts six through ten of the indictment which dealt with "packing houses", the Government called a sampling of their employees. These for the most part were "checkers".

Unfortunately for the Government their testimony did not establish the falsity of any statement made by the defendant to the grand jury.

The grand jury testimony of Courtney, taken in the light most favorable to the Government, was that he had given gratuities "at" certain named "packing houses". Though pressed to do so, he refused to name the person to whom he had made these payments (Courtney, Grand Jury Testimony 01418 *et seq.*). Nor did he testify regarding the type of work done by the packing house personnel to whom gratuities were given.

In calling the packing house "checkers", the Government assumed that these are the persons who would be

the likely recipients of the defendant's bounty (App. 435). But there is no basis for such an assumption in the record, the indictment does not so charge (see Counts 6 through 10), and for all that appears the defendant may in fact have paid out money to the owners of the packing houses or to any of the various other types of employees that they had.

In this state of the record the trial court should have granted the defendant's motion for a judgment of acquittal on counts 1, 2, 6, 7, 8, 9, and 10.

Apart from this gaping hole in the factual proof there was another failure which lay in a different direction and which affected every count of the indictment.

Contrary to the rule in some other jurisdictions (see *e.g.*, *People* v. *Clemente*, 285 App. Div. 258, aff'd 309 N. Y. 890) the established rule in the federal courts is that the question of materiality in a perjury case is primarily a question of law to be decided by the court rather than the jury (*United States* v. *Weber*, 197 F. 2d 237, 238). Nevertheless, since it is an element of the crime, it is essential that the prosecution affirmatively prove the materiality of the allegedly false testimony (*Sinclair* v. *United States*, 279 U. S. 263, 296-7). For though the finding on the score of materiality is to be made by the court it must be based upon evidence in the record (*United States* v. *Weber*, *supra*, 197 F. 2d 237; *Luse* v. *United States*, 49 F. 2d 245).

Presumably it was to fill this need that the Government called as a witness the foreman of the grand jury (Geoghegan 47-56). He testified that the grand jury was investigating racketeering, union payoffs, extortion, income tax violations and links between the underworld and industry (R. 50). He further testified that the defendant Courtney was questioned concerning an account carried on his books as "Garage, gas and oil" (R. 52).

This was the substance of his entire testimony which consumes less than ten pages of the record including extensive colloquy (R. 47-56).

Certainly it is plain that the bare statement of the subject matter of the grand jury investigation does not demonstrate the materiality of the questions put to the defendant regarding his minuscule payments to elevator men.

We are well aware that apparently collateral matters may be material to a grand jury investigation. But where such collateral matters are relied upon, their materiality must be demonstrated by record proof and must be shown to have "a natural effect or tendency to impede, influence or dissuade the Grand Jury" (*Carroll* v. *United States*, 16 F. 2d 951, 953).

In its charge the trial judge instructed the jury that the grand jury "deemed it material to find out to whom these monies were paid" (App. 422). We cannot find any evidence in the record which attests to any such conclusion on the part of the grand jurors nor would such an opinion, if expressed, substitute for actual proof of materiality.

We think the trial judge was not insensible to this problem, for when Agent Flynn took the stand the judge himself posed a series of questions designed to show that the agent had not been able to find out to whom the "Garage, gas and oil" money, shown by Courtney's books, had been paid. These questions perhaps formed the basis for the trial court's later finding of "impeding" which is, of course, equivalent to a finding of "materiality". In this connection we can only point out, as we have already done, that the test of materiality is whether the grand jury was impeded and not whether FBI Agent Flynn was impeded.

In a somewhat similar vein it is noted in passing that the question of materiality was not wholly a question of law for the trial judge, although treated by him as such.

As was pointed out by the Court of Appeals in the *Luse* case, *supra,* materiality is actually a mixed question of law and fact. The jury must decide what the nature of the prior proceedings was as a question of fact. Once that is passed upon by the jury, the court determines whether the allegedly perjurious testimony was material to those proceedings. So in the case at bar—although unlikely—the trial jury might have wished to reject the grand jury foreman's testimony that the subject matter of its investigation was racketeering, trucking, etc. (R. *50*). Of course, they were never given the opportunity to do so (App. 422).

B. The prosecution's case failed to meet the requirements of the two witness rule.

The prosecution's case with respect to all counts of the indictment was fatally defective under the unique "two-witness" rule applicable to perjury prosecution.

With minor variations—not applicable in the case at bar—the two witness rule requires that the *falsity* of the alleged perjurious statement be established by the direct testimony of one witness and must be corroborated by other independent testimony (*United States* v. *Nessanbaum,* 205 F. 2d 93).

In the instant case, the Government's proof followed the same pattern with respect to each count of the indictment and an analysis of the proof advanced in support of one count will serve to demonstrate the state of the proof regarding all of the charges. We will utilize the proof offered under the fifth count of the indictment as an example.

This count charged that the defendant lied when he testified before the Grand Jury that he had paid out money to freight elevator operators at a building known as 501 Seventh Avenue, in the week ending June 22, 1956 (App. 10).

To prove the falsity of the defendant's statement, the Government called eight elevator men, each of whom denied having received money from the defendant (Cooper R. 161, Bowen R. 209, Clukies R. 396, Ward R. 459, Brown R. 739, Santa Cruz R. 631, Thomas R. 339, Walsh R. 465).

The witness Walsh, by way of example, testified that he was a relief elevator operator at 501 Seventh Avenue and that he, personally, had never received any money from the defendant (R. 465-7). Standing alone, this testimony did not prove the falsity of the defendant's Grand Jury testimony. Nor did the testimony of each of the other employees of that building—considered separately—prove that Courtney had lied.

Taken altogether, the joint effect of their testimony might be considered as direct proof of the falsity of the defendant's Grand Jury testimony. But it can only be effective as proof of falsity when considered *en masse*.

In short, the testimony of each elevator operator was only one link in a chain of proof. The entire chain only served to prove one ultimate fact, namely, that the defendant's testimony regarding 501 Seventh Avenue was false.

For the purpose of the two witness rule, the testimony of these eight men was only the equivalent of one witness. Clearly, the composite testimony of two or more witnesses, each of whom merely testifies as to a link in a chain of facts intended to show falsity, requires other corroboration before it may serve as the basis for a perjury conviction.

A strikingly similar situation is found in *People* v. *Layman*, 117 Cal. App. 476, 4 P. 2d 242. That case was a perjury prosecution based on the defendant's prior testimony regarding a street car accident. The prosecutor sought to show that the accident had never happened.

In that case—exactly as in the case at bar—the people proffered the testimony of all the motormen and conduc-

tors on the trolley line to testify that no accident had occurred. In considering this testimony, the appellate court in California properly concluded that (*People* v. *Layman*, *supra*, 4 P. 2d 242, 245):

> "This composite testimony of the motormen is, of course, the equivalent of that of but one witness to the fact that no accident had taken place."

The reason for the rule is plain. If any one of the motormen in the *Layman* case or of the elevator operators in the instant case lied, then the entire proof of falsity is worthless. Were such composite testimony sufficient by itself, then the defendant in a perjury case could, in fact, be convicted because of the untruthful testimony of one witness. This is precisely the result which the two witness requirement forbids.

It is thus completely apparent that the testimony of each group of witnesses produced by the Government required corroboration. There is no corroboration in the record.

Apart from the "group" witnesses, the Government brought to the stand only four other witnesses (Perman R. 491, Koghet R. 296, Flynn R. 705, Crane R. 763).

It is difficult to say exactly what purpose their testimony was thought to serve. Perman, a bookkeeper at defendant's business, identified the defendant's books of account and testified regarding the handling of petty cash and loans to employees. Koghet was the defendant's accountant, while Flynn and Crane were F.B.I. agents. The latter accounted for the absence of one witness and testified that on his arrest the defendant had denied his guilt.

Whatever the testimony of these witnesses was designed to accomplish, it did not furnish the corroboration envisioned by the two witness rule. For under that rule the Government is required to produce testimony which must *independently* tend to show the alleged perjury (*U. S.* v.

Hiss, 185 F. 2d 822; *McWhorter* v. *United States*, 193 F. 2d 982, 985; *Fraser* v. *U. S.*, 145 F. 2d 145, 151; *United States* v. *Buckner*, 118 F. 2d 468). Moreover, "the path from the corroborating evidence must lead directly to the inevitable—not merely probable—conclusion of falsity" (*Neff* v. *United States*, 218 F. 2d 297, 308).

There is no evidence whatever in the record which even approaches a fulfillment of these stringent requirements. In the absence of such proof, the Trial Court should have directed the entry of a judgment of acquittal upon all courts.

The Trial Judge was, of course, entirely aware that the successful prosecution of the case depended upon the production of corroborating evidence. He must likewise have been aware that to a jury of laymen eight witnesses from one building would appear to amply fulfill the requirement of the two witness rule, unless the Jury were clearly instructed to the contrary. No such instruction was given.

Contrariwise, the Trial Judge contented himself with the simple statement that (App. 425):

> "in order to convict a defendant of perjury, the facts must be established by the government by the direct testimony of two independent witnesses whose testimony you, the jury, believe to be true and which, in your minds corroborates the testimony of the one direct witness beyond a reasonable doubt."

This undoubtedly left the jury with the impression that there was in the record single witness, direct testimony of falsity—which there was not. It also left them free to consider the testimony of one elevator man as corroborative of another, or even to consider the evidence adduced in support of one count of the indictment as corroborative of the others (App. 425-8).

The defendant's requested charges numbered 20, 22, 23 and 25, had they been given, might have gone far to correct this error (App. 410).

In summary it appears (1) that no adequate corroborating evidence was offered by the Government, and (2) that had such proof existed in the record, the Court's charge would not properly have submitted it to the jury, which was free to find corroboration in testimony not properly considerable as such. (See, *United States* v. *Balodinics*, 177 F. 2d 485; *Felton* v. *United States*, 170 F. 2d 153, cert. den. 335 U. S. 831. Also, *Marvin* v. *State*, 14 S. W. 87, 53 Ark. 395; *Lea* v. *State*, 1 So. 235, 64 Miss. 278; *Williams* v. *Commonwealth*, 91 Pa. 493.)

POINT II

Additional Errors In The Conduct Of The Trial Merit Appellate Review

Although we believe that we have already demonstrated sufficient reason for this Court to grant a further review of the proceedings, we briefly call to the Court's attention three additional considerations which merit complete briefing and argument before this Court.

A. The Court failed to submit an essential element of the crimes charged for the consideration of the jury.

The Government charged that the defendant lied in claiming to have given gratuities to elevator operators and "at packing houses". These charges were framed in the indictment by piecing together Grand Jury testimony of the defendant given at widely separated intervals (App. 3-17 compare, Exhs. 1 and 2).

While there was no question that the defendant said the words contained in the transcripts of his Grand Jury testimony, there was a question whether those words conveyed the meaning attributed to them by the Government and charged in the indictment. Indeed, the defendant contended that they did not (App. 329-32).

The defendant having put the Government to its proof by his plea and having raised the objection upon the trial, this issue framed a question for the determination of the jury, namely, whether the defendant had in fact testified that he had paid money at the places charged. This was an essential preliminary question. If resolved in the defendant's favor, a judgment of acquittal would inevitably follow.

However, in its charge the Court completely by-passed this element of the crime and instructed the jury simply that they were to determine (App. 416):

> "(1) Was the testimony given by the defendant false, and
>
> "(2) Did the defendant give the testimony, knowing it to be false, and with the willful intent to give false testimony to the grand jury."

At a later stage, the Court reinserted this element (see App. 423). However, the rule is well settled that where two instructions are given on the same matter and one is erroneous, prejudicial error results (*United States* v. *Donnelly*, 179 F. 2d 227; *McFarland* v. *United States*, 174 F. 2d 538).

B. The Trial Court improperly failed to frame the issues.

The indictment referred in each count to expenditures of $395.03, covered on the books of the defendant's corporation for the week of June 15. The perjury itself concerned only the much lesser sum of approximately $75.00.

Both before and during the trial, defense counsel sought to limit the issue to the amount charged in the indictment but without success (*e.g.*, App. 26; R. 782, 1005, 1016-7). The prosecutor, in his summation, was permitted to argue—over objection of defense counsel—that the amount of money concealed by the defendant was $300.00 or $400.00

per week and "that is what this case is all about" (App. 394, 401). In overruling the defendant's objection, the Court commented (App. 394) that

"The jury will understand what the issue is."

If this was a promise to clarify the point in his charge, it was not fulfilled. The Trial Court never directed the jury's attention to the $75.00 in issue.

CONCLUSION

The instant case is one in which the Government has sought and obtained a conviction on a novel theory never previously reviewed by this Court. Nor has this theory been tested on the original appeal.

There is, it is respectfully submitted, grave doubt whether the conviction should be permitted to stand. In view of the severe jail term imposed upon the defendant, the interests of justice would best be served by granting to the defendant a rehearing of his appeal.

Respectfully submitted,

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I certify that this petition for rehearing, in my opinion, is well founded in law and in fact, and that it is not filed for the purpose of delay.

MAURICE EDELBAUM